Tentative Rulings for October 19, 2016
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

14CECG00823 ***Sanchez v. Tang, M.D., et al.*** **is continued to Thursday, November 17, 2016, at 3:30 p.m. in Dept. 501.**

15CECG01374 ***Watanabe et al. v. Castech Pest Services et al.*** **is continued to Wednesday, November 2, 2016 at 3:30 p.m. in Dept. 501.**

15CECG02741 ***Capriola v. Expressed Services, Inc.*** **is continued to Tuesday, October 25, 2016 at 3:30pm in Dept. 403.**

16CECG02082 ***Cutler v. Coelho et al.*** **is continued to Tuesday, October 25, 2016 at 3:30pm in Dept. 403.**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

(2)

Tentative Ruling

Re: ***In re Crystal Villa***
Superior Court Case No. 16CECG01696

Hearing Date: October 19, 2016 (Dept. 402)

Motion: Petition to Compromise Minor's Claim

Tentative Ruling:

To grant in part. Proposed order is signed.

Explanation:

In the petition additional orders are sought specifically that the claimant's medical records and bills submitted be filed as confidential. As was noted in the court's prior ruling, the attorney has not made a request in compliance with the law that would prevent these records from being part of the public record. This portion of the petition will not be granted. The proposed order submitted does not contain this additional order and therefore the order submitted will be signed.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 10/18/16
(Judge's initials) (Date)

(2)

Tentative Ruling

Re: ***In re Delia Villa***
Superior Court Case No. 16CECG01676

Hearing Date: October 19, 2016 (Dept. 402)

Motion: Petition to Compromise Minor's Claim

Tentative Ruling:

To grant in part. Proposed order is signed.

Explanation:

In the petition additional orders are sought specifically that the claimant's medical records and bills submitted be filed as confidential. As was noted in the court's prior ruling, the attorney has not made a request in compliance with the law that would prevent these records from being part of the public record. This portion of the petition will not be granted. The proposed order submitted does not contain this additional order and therefore the order submitted will be signed.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 10/18/16
(Judge's initials) (Date)

Tentative Rulings for Department 403

(6)

Tentative Ruling

Re: ***Baldwin v. Aon Risk Services Companies, Inc.***
Superior Court Case No.: 14CECG00572

Hearing Date: October 19, 2016 (**Dept. 403**)

Motion: By Defendants/Cross Complainants Aon Risk Services Companies, Inc., Aon Risk Insurance Services West, Inc., Aon plc, Defendant Aon Group, Inc., and Cross Complainant Aon to permit Brett Ingerman to appeal as counsel pro hac vice

If any oral argument is requested it will be heard, October 25th, 2016 at 3:30 pm.

Tentative Ruling:

To grant.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 10/18/16
(Judge's initials) (Date)

(17) **Tentative Ruling**

Re: ***Windfield v. Roberts, et al.***
Case No. 16 CECG 001601

Cattuzzo v. Windfield.
Case No. 16 CECG 02151

Hearing Date: October 19, 2016 (Dept. 403)

Motion: Motion to Consolidate

Tentative Ruling:

To deny.

If any oral argument is requested it will be heard, October 25th, 2016 at 3:30 pm.

Explanation:

Code of Civil Procedure section 1048(a) provides: "When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

California Rule of Court, rule 3.350 has been fully complied with.

The purpose for consolidation is to promote trial convenience and economy by avoiding duplication of procedure particularly in the proof of issues common to both actions. (See *McClure v. Donovan* (1949) 33 Cal.2d 717.) This purpose is accomplished by either: 1) complete consolidation resulting in a single action, or 2) consolidation of separate actions for trial. Consolidation under Code of Civil Procedure section 1048 is permissive, and it is for the trial court to determine whether the consolidation is for all purposes or for trial only. (See *Committee for Responsible Planning v. City of Indian Wells* (1990) 225 Cal. App. 3d 191, 196, fn. 5.)

In complete consolidation, which may be utilized *where the parties are identical* and the causes could have been joined, the pleadings are regarded as merged, one set of findings is made, and one judgment is rendered. In a consolidation for trial, the pleadings, verdicts, findings and judgments are kept separate; the actions are simply tried together for the sake of convenience and judicial economy. (*Sanchez v. Superior Court* (1988) 203 Cal.App.3d 1391, 1396.) An order granting or denying all or part of a motion to consolidate must be filed in each case sought to be consolidated. If the motion is granted for all purposes including trial, any subsequent document must be filed only in the lead case. (Cal. Rule of Court, rule 3.350 (c).)

The plaintiff and cross-complainant are asking only for complete consolidation. (Memorandum of Points and Authorities at 5:3-10.)

Complete consolidation would not be appropriate in this case, but consolidation for trial would be. The parties are not identical. The first action, *Windfield v. Roberts, et al*., Fresno County Superior Court Case No. 16CECG01601 involves Nicole Windfield, Chris Roberts, Jr., and *Amanda Cattuzzo*. The second action, *Cattuzzo v. Windfield*, Fresno County Superior Court Case No. 16CECG02151, involves a different party, *Jilda Cattuzzo* and Nicole Windfield. While there are common issues as to causation, each plaintiff's damage claim will be different and each plaintiff should have his or her own judgment. Again, in complete consolidation, the parties must be the same. (*Sanchez v. Superior Court, supra,* 203 Cal.App.3d at p. 1396; *Hamilton v. Asbestos Corp*. (2000) 22 Cal.4th 1127, 1147-1148.)

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 10/18/16
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***The People of the State of California, Department of Transportation v. Leonardo Bros. Dairy et al.***
Superior Court Case No. 16 CECG 01562

Hearing Date: October 19, 2016 **(Dept. 403)**

Motion: Order for Possession of Parcel Nos. FB-10-0729-1 and FB-10-0729-2.

Tentative Ruling:

To grant the motion pursuant to CCP § 1255.410(d). The Plaintiff is granted the right of possession no sooner than **November 24, 2016.** Plaintiff is ordered to serve the Order on **all named Defendants** regardless of whether they have been defaulted.

If any oral argument is requested it will be heard, October 25th, 2016 at 3:30 pm.

Explanation:

Background

On May 16, 2016, the People of the State of California filed a complaint in eminent domain for purposes of constructing the High Speed Rail project. On the same day, it filed a Lis Pendens. It appears from the maps attached to the Complaint that the property is located near the intersection of S. Clovis Avenue and E. Elkhorn Avenue in Selma, CA. The parcel nos. are FB-10-0729-1 and FB-10-0729-2. All Defendants have been served; either personally or via substituted service at their residences or places of business.

On June 27, 2016, the State filed notice of deposit of **$319,700** with the State Treasurer and the Declaration of Michael E. Lockard Re: Summary of the basis for the appraisal pursuant to CCP § 1255.010. On July 8, 2016, the State filed a motion seeking an order for pre-judgment possession pursuant to CCP § 1255.410. The motion was served by mail on all Defendants on July 8, 2016. Chicago Title Company filed a filed disclaimer of interest on July 18, 2016. The defaults of Earl Smith and Lucille Smith were entered on August 23, 2016.

Notably, the Declaration of Granados states at ¶ 2 that the property is used as a vineyard and a residence. But, the identity of the occupant(s) is not stated. However, the property appears to be part of the Leonardo Bros. Dairy. The managing partner was served on June 17, 2016.

Applicable Law

"The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation." (Cal. Const., Art. I, §19.) "The court in which a proceeding in eminent domain is brought has the power to: (a) Determine the right to possession of the property, as between the plaintiff and the defendant, in accordance with this title. (b) Enforce any of its orders for possession by appropriate process. The plaintiff is entitled to enforcement of an order for possession as a matter of right." (CCP § 1230.050.) The "appropriate process" includes writs of possession and orders for possession under CCP § 1255.410 et seq.

The plaintiff may apply for an order for possession at the time of filing the complaint or at any time **after** filing the complaint but prior to entry of judgment. The two conditions are that the plaintiff (a) is entitled to take the property by eminent domain, and (b) has made a deposit that satisfies CCP § 1255.010 et seq. (CCP § 1255.410(a).) The plaintiff is also entitled to possession in either of two special situations: (a) Each defendant entitled to possession has expressed in writing his or her "willingness to surrender possession of the property on or after a stated date." (b) Each defendant has withdrawn a portion of the deposit. (CCP § 1255.460(a).)

The statute requires that the motion for an order of possession describe the property sought to be taken, which may be by reference to the complaint, and the date after which the plaintiff is seeking to take possession. The motion **must** include a statement regarding the property owner's right to oppose the order, which includes notice of the 30-day time limit for filing a written opposition. (CCP § 1255.410(a). The plaintiff must serve a copy of the motion on the record owner and on any occupants. The plaintiff must set the hearing on the motion not less than 60 days after service for unoccupied property and 90 days after service for an occupied dwelling, farm, or business operation. (CCP § 1255.410(b).)

The order must describe the property, which may be by reference to the complaint, and must state the date authorized for possession. (CCP § 1255.460) Where possession is by consent or after withdrawal of a deposit, the order must also state that it is made under CCP § 1255.460.

The plaintiff, by taking possession, does not waive the right to appeal from the judgment, to move to abandon, or to request a new trial. (CCP § 1255.470.) The determination of the right to take by eminent domain—a condition of the order—is preliminary only. "The granting of an order for possession does not prejudice the defendants' right to demur to the complaint or to contest the taking. Conversely, the denial of an order for possession does not require a dismissal of the proceeding and does not prejudice the plaintiff's right to fully litigate the issue if raised by the defendant." "Nothing in this article limits the right of a public entity to exercise its police power in emergency situations." (CCP § 1255.480.)

When the motion is not opposed within 30 days of service, the court must make an order for possession if it finds that **(a)** the plaintiff is entitled to take the property by eminent domain, and **(b)** the plaintiff's deposit satisfies statutory requirements. (CCP §

1255.410(d)(1).) When the property owner or occupant files a timely opposition to the motion, the court also must consider at the hearing (a) whether there is an overriding need for the plaintiff to possess the property prior to final judgment, and whether the plaintiff will suffer substantial hardship if possession is limited or denied, and (b) whether the plaintiff's hardship from limiting or denying possession outweighs any hardship to the property owner or occupant from granting possession. (CCP § 1255.410(d)(2).)

Motion at Bar

Here, the motion was properly set not less than 90 days after service of the notice of motion on the record owner and any occupants of the occupied property. See proof of service on July 8, 2016 via regular mail. The proper warning was given to the Defendants re: opposition. See Notice of Motion at page 2 lines 11-16.

In support of the application, Plaintiff relies upon the Declaration of Jorge Granados in support of the motion. He states: "Failure to secure possession of the Subject Property and the remaining parcels in the right-of—way corridor in an expedient manner will (1) risk the loss of significant funding necessary to complete the project, (2) impact the Design Builder's ability to construct the project in an efficient fashion as required under the design-build method, and (3) expose the Authority to potentially substantial delay damage claims under the construction contract. See Declaration at ¶ 5a.

As a result, Plaintiff has met all conditions for pre-judgment possession. The Plaintiff is entitled to take the property via eminent domain and has deposited an amount that satisfies the requirements of Article 1 of the Eminent Domain Law. [CCP § 1255.410(a)] See Declaration of Lockard filed on June 27, 2016. 2016. Therefore, the motion will be granted pursuant to CCP § 1255.410(d). The Plaintiff is granted the right of possession no sooner than **November 24, 2016.**

Pursuant to California Rules of Court, Rule 391(a) and Code of Civil Procedure § 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 10/18/16
(Judge's initials) (Date)

Tentative Rulings for Department 501

(30)

Tentative Ruling

Re: ***John Pevyhouse v. Karen Higgens***

Superior Court No. 15CECG03343

Hearing Date: Wednesday, October 19, 2016 (**Dept. 501**)

Motion: (1) Plaintiffs' Demurrer to Answer
(2) Plaitniffs' Motion to Strike Answer

Tentative Ruling:

To **Sustain** demurrer to:
- Second Affirmative Defense (1);
- Third Affirmative Defense (1) and (3);
- Forth Affirmative Defense (1) and (3);
- Fifth Affirmative Defense (1) and (3);
- Seventh Affirmative Defense (1) concerning *Attorney's Fees only*;
- Eighth Affirmative Defense (1);
- Ninth Affirmative Defense (1);
- Tenth Affirmative Defense (1) concerning *Discharge only;*
- Eleventh Affirmative Defense (1);
- Twelfth Affirmative Defense (1) concerning *Reservation of Rights only* and (3)*;*
- Thirteenth Affirmative Defense (1) and (3) concerning *Comparative Fault of Third Parties and Apportionment only*;
- Fifteenth Affirmative Defense (1) and (3) concerning *Fault of Third Parties and Apportionment only;*
- Sixteenth Affirmative Defense (1);
- Seventeenth Affirmative Defense (1);
- Nineteenth Affirmative Defense (1) and (3) concerning *Fault of Third Parties and Comparative Fault of Third Parties only;*
- Twentieth Affirmative Defense (1)*;*
- Twenty-Sixth Affirmative Defense (1) and (4)*;*
- Twenty-Eighth Affirmative Defense (1).

To **Overrule** demurrer to:
- Second Affirmative Defense (2);
- Third Affirmative Defense (2) and (4);
- Forth Affirmative Defense (4);
- Fifth Affirmative Defense (2);
- Sixth Affirmative Defense;
- Seventh Affirmative Defense (1) concerning *Costs only* and (2);
- Eighth Affirmative Defense (2);
- Ninth Affirmative Defense (2) and (3);

- Tenth Affirmative Defense (1) concerning *Performance only,* (2) and (3)*;*
- Eleventh Affirmative Defense (2) and (3);
- Twelfth Affirmative Defense (1) concerning *Conclusory Terms only* and (2)*;*
- Thirteenth Affirmative Defense (2) and (3) concerning *Unclean Hands only*;
- Fifteenth Affirmative Defense (2) and (3) concerning *Unclean Hands only;*
- Sixteenth Affirmative Defense (2);
- Seventeenth Affirmative Defense (2) and (3);
- Nineteenth Affirmative Defense (2) and (3) concerning *Unclean Hands only;*
- Twentieth Affirmative Defense (2)*;*
- Twenty-Sixth Affirmative Defense (2) and (3)*;*
- Twenty-Seventh Affirmative Defense;
- Twenty-Eighth Affirmative Defense (2).

To **Order** Plaintiffs' motion to strike Defendant's Seventh Affirmative Defense off calendar, concerning Attorney's Fees *only*.

To **Deny** Plaintiff's motion to strike Defendant's Seventh Affirmative Defense, concerning Costs *only*.

To **Grant** Plaintiff's motion to strike Defendant's prayer for attorney's fees.

To grant Defendant 10 days leave to amend. (Cal. Rules of Court, rule 3.1320(g).) The time in which an amended answer may be filed will run from service by the clerk of the minute order. (Code Civ. Proc., § 472b.)

Explanation:

DEMURRER

Demurrer to Second Affirmative Defense
(1) Code Civ. Proc., § 430.20 subd. (a): *Uncertainty*
A complaint is uncertain when it is so bad that defendant *cannot reasonably* respond—i.e., he or she cannot reasonably determine what issues must be admitted or denied, or what counts or claims are directed against him or her. (*Khoury v. Maly's of Calif., Inc.* (1993) 14 Cal.App.4th 612, 616.)

Here, all causes of action are based on the same *clear* allegations: Decedent loaned Defendant Higgins $80,000 and she hasn't paid it all back. (FAC, ¶¶ 10-11, 13.) Therefore, to adequately assert uncertainty, Defendant must plead new matter *using* ultimate facts, not legal conclusions. Defendant fails to do so. Demurrer sustained.

(2) Code Civ. Proc., § 430.20 subd. (b): *defense does not refer to cause of action*
Here, Defendant does not *explicitly* specify which causes of action this defense applies to. However, it is obvious that it applies to all causes of action. It states, "The Plaintiffs' First Amended Complaint is uncertain." (Answer, ¶ 2.) Demurrer overruled.

Demurrer to Third Affirmative Defense
(1) Code Civ. Proc., § 430.20 subd. (a): *Estoppel, Waiver, Laches of Action*
- Estoppel
Equitable estoppel is a defensive doctrine operating to prevent one party from taking an unfair advantage of another. (*Franklin v. Merida* (1868) 35 Cal. 558, 567; *In re Marriage of Umphrey* (1990) 218 Cal.App.3d 647, 658; *Green v. Travelers Indemnity Co.* (1986) 185 Cal.App.3d 544, 555*; In re Estate of Hafner* (1986) 184 Cal.App.3d 1371, 1395; *San Diego Municipal Credit Union v. Smith* (1986) 176 Cal.App.3d 919, 922–23; *Kleinecke v. Montecito Water District* (1983) 147 Cal.App.3d 240, 245; *People ex rel. Department of Public Works v. Volz* (1972) 25 Cal.App.3d 480, 488; *Meyer v. Glenmoor Homes, Inc.* (1966) 246 Cal.App.2d 242, 267.)

The elements of estoppel must be pleaded in the answer with sufficient detail to disclose the facts on which the party asserting estoppel relies. (*Enterprise Leasing Corp. v. Shugart Corp.* (1991) 231 Cal.App.3d 737; *Santa Barbara County Taxpayer Ass'n v. Board of Supervisors* (1989) 209 Cal.App.3d 940, 947; *Chalmers v. County of Los Angeles* (1985) 175 Cal.App.3d 461, 467; *Hentzel v. Singer Co.* (1982) 138 Cal.App.3d 290, 304; *Division of Labor Law Enforcement v. Transpacific Transp. Co.* (1979) 88 Cal.App.3d 823, 828.) However, when the complaint itself sets out the facts that establish equitable estoppel, the court may find that the answer need not expressly include the defense. (*Smith v. Anglo–California Trust Co.* (1928) 205 Cal. 496, 504–05, disapproved on other grounds in *Lucas v. Hamm* (1961) 56 Cal.2d 583, 591; *Insurance Co. of the West v. Haralambos Beverage Co.* (1987) 195 Cal.App.3d 1308, 1321, disapproved on other grounds in *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 838–39 & n.12.)

Here, there are no facts in the FAC to indicate that Defendant was unfairly taken advantage of. Therefore, to adequately assert estoppel, Defendant must plead new matter *using* ultimate facts, not legal conclusions. Defendant fails to do so. Demurrer sustained.

- Waiver
Waiver exists when plaintiff has waived whatever right or privilege is essential to the plaintiff's claim. (*Roesch v. De Mota* (1944) 24 Cal.2d 563, 572.)

The facts supporting waiver must be specifically pleaded, unless the complaint itself sets out the facts supporting a finding of waiver. (*Aetna Casualty & Surety Co. v. Richmond* (1977) 76 Cal.App.3d 645, 653; *Windsor Mills v. Richard B. Smith, Inc.* (1969) 272 Cal.App.2d 336, 342; *Meyer Koulish Co. v. Cannon* (1963) 213 Cal.App.2d 419, 432; *Insurance Co. of the West, supra,* 195 Cal.App.3d 1308 at p. 1321–22; *Phoenix Mut. Life Ins. Co. v. Birkelund* (1946) 29 Cal.2d 352.)

Here, there are no facts in the FAC to support waiver. Plaintiffs allege that Decedent loaned Defendant money *with the understanding* that she would pay it back. (FAC, ¶10.) Therefore, to adequately assert waiver, Defendant must plead new matter *using* ultimate facts, not legal conclusions. Defendant fails to do so. Demurrer sustained.

- Laches
Laches is neglect or failure on the part of a plaintiff to assert a right, which results in prejudice to the defendant. (*Columbia Engineering Co. v. Joiner* (1965) 231 Cal.App.2d 837, 857; *Howard v. Societa Di Unione E Beneficenza Italiana* (1944) 62 Cal.App.2d 842, 851–52, quoting *De Mattos v. McGovern* (1938) 25 Cal.App.2d 429, 433.) "The elements of laches are (1) the failure to assert a right (2) for some appreciable period so as to amount to unreasonable delay (3) which results in prejudice to the adverse party." (*In re Marriage of Powers* (1990) 218 Cal.App.3d 626, 642; *Magic Kitchen LLC v. Good Things Int'l Ltd*. (2007) 153 Cal.App.4th 1144, 1157.)

When the presence of laches and prejudice is revealed on the face of the complaint, the defense is established pending proof of any excuse by the plaintiff. (*Williams v. Smith* (1954) 127 Cal.App.2d 607, 612; *Phoenix Mut. Life Ins. Co., supra,* 29 Cal.2d 352 at p. 363; *Victor Oil Co. v. Drum* (1920) 184 Cal. 226, 242–43; *Bodily v. Parkmont Village Green Home Owners Ass'n* (1980) 104 Cal.App.3d 348, 358.) However, when the complaint is silent on the issue, a general denial alone does not place laches in issue. (*Hunter v. Croysdill* (1959) 169 Cal.App.2d 307, 318.) And the defendant must plead not only the defense of laches but also the facts giving rise to laches in the answer. (*Protopappas v. Protopappas* (1963) 213 Cal.App.2d 659, 664–65; *Hamud v. Hawthorne* (1959) 52 Cal.2d 78, 84; *Carlson v. Lindauer* (1953) 119 Cal.App.2d 292, 309; *Chilberg v. City of Los Angeles* (1942) 54 Cal.App.2d 99, 101; *Garrity v. Miller* (1928) 204 Cal. 454, 455.) As one court explained, a pleading stating "plaintiff's Complaint is barred by laches" is insufficient as it fails to plead facts giving rise to that defense. (*Hollenbeck Lodge v. Wilshire Boulevard Temple* (1959) 175 Cal.App.2d 469, 475.)

Here, there are no facts in the FAC to support laches or prejudice. Plaintiffs allege that Defendant breached the contract in October 2015 (FAC, ¶ 16); they filed this case October 27, 2015. Therefore, to adequately assert laches, Defendant must plead new matter *using* ultimate facts, not legal conclusions. Defendant fails to do so. Demurrer sustained.

(2) Code Civ. Proc., § 430.20 subd. (b): *defense does not refer to cause of action*
Here, Defendant clearly asserts that these defenses apply to "[E]ach and every cause of action." (Answer, ¶ 3.) Demurrer overruled.

(3) Code Civ. Proc., § 430.20 subd. (b): *defense is duplicative*
Here, Defendant asserts waiver twice, both times lacking new matter. (Answer, ¶ 5.) It is therefore impossible to determine how they differ. Demurrer sustained.

(4) Code Civ. Proc., § 430.20 subd. (b): *failure to label*
Here, Defendant alleges Estoppel, Waiver, and Laches all as part of the Third Affirmative Defense. Though technically inappropriate, it is obvious based on way the answer is formatted, that Defendant is alleging each defense separately. Each defense is part of a sub-heading, separated by commas. (Answer, ¶ 3.) Demurrer overruled.

Demurrer to Fourth Affirmative Defense
(1) Code Civ. Proc., § 430.20 subd. (a): *Statute of Limitations*
The statute of limitations can be raised as an affirmative defense in one of two ways. The first is to allege all the facts demonstrating that the action is barred. (*Hall v. Chamberlain* (1948) 31 Cal.2d 673, 680; *Brown v. World Church* (1969) 272 Cal.App.2d 684, 691.) The second is to comply with Code of Civil Procedure section 458 and plead that the cause of action is barred by the specific section *and* subdivision at issue. (*Martin v. Van Bergen* (2012) 209 Cal.App.4th 84, 91; *Brown, supra,* 272 Cal.App.2d 684 at p. 691; *Mysel v. Gross* (1977) 70 Cal.App.3d Supp. 10, 15; *Davenport v. Stratton* (1944) 24 Cal.2d 232, 246-247.)

Here, Defendant neither pleads facts nor cites to any specific law. Demurrer sustained.

(2) Code Civ. Proc., § 430.20 subd. (b): *defense does not refer to cause of action*
Here, Defendant clearly asserts that these defenses apply to "[E]ach and every cause of action." (Answer, ¶ 4.) Demurrer overruled.

(3) Code Civ. Proc., § 430.20 subd. (b): *specificity*
A pleading that fails to specify both the applicable statute *and subdivision* "raise(s) no issue and present(s) no defense." (*Davenport, supra,* 24 Cal.2d 232 at p. 246-247; *Brown, supra,* 272 Cal.App.2d 684 at p. 691.)

Here, although all causes of action are governed by Code of Civil Procedure section 339, it has many subdivisions. Therefore, Defendant's failure to state the statute of limitations with particularity creates uncertainty. Demurrer sustained.

Demurrer to Fifth Affirmative Defense
(1) Code Civ. Proc., § 430.20 subd. (a): *Waiver/No Damages*
See Demurrer to Third Affirmative Defense section (1). Demurrer sustained.

(2) Code Civ. Proc., § 430.20 subd. (b): *defense does not refer to cause of action*
Here, Defendant does not *explicitly* specify which causes of action this defense applies to. However, it is obvious that it applies to all causes of action. It states, "Decedent waived <u>any</u> duty." (Answer, ¶ 5 [emphasis added].) Demurrer overruled.

(3) Code Civ. Proc., § 430.20 subd. (b): *defense is duplicative*
See Demurrer to Third Affirmative Defense section (3). Demurrer sustained.

Demurrer to Sixth Affirmative Defense
(1) Code Civ. Proc., § 430.20 subd. (a): *No Entitlement to General, Special and/or Consequential Damages*

Here, Defendant adequately asserts a *traverse* to Plaintiff's plea for damages. Demurrer overruled.
(2) Code Civ. Proc., § 430.20 subd. (b): *defense does not refer to cause of action*
Here, Defendant does not *explicitly* specify which causes of action this defense applies to. However, it is obvious that it applies to all causes of action. It refers to the entire "<u>First Amended Complaint.</u>" (Answer, ¶ 6 [emphasis added].) Demurrer overruled.

Demurrer to Seventh Affirmative Defense
(1) Code Civ. Proc., § 430.20 subd. (a): *No Entitlement to Attorney's Fees or Cost of Suit - Attorney's Fees*
No prayer for attorney's fees appears on the face of the complaint. Therefore, to adequately support this assertion, Defendant must plead new matter *using* ultimate facts, not legal conclusions. Defendant fails to do so. Demurrer sustained.

- Costs
Generally, the "prevailing party" is entitled *as a matter of right* to recover costs of suit in any action or proceeding. (Code Civ. Proc., § 1032(b); *Santisas v. Goodin* (1998) 17 Cal.4th 599, 606; *Plancich v. United Parcel Service, Inc.* (2011) 198 Cal.App.4th 308, 312-314.) Therefore, to assert that Plaintiffs are not entitled to costs is the same as a general denial. Here, Defendant's pleading is sufficient. Demurrer overruled.

(2) Code Civ. Proc., § 430.20 subd. (b): *defense does not refer to cause of action*
Here, Defendant does not *explicitly* specify which causes of action this defense applies to. However, it is obvious that it applies to all causes of action. It states, "In no event are Plaintiffs entitled to attorney's fees." (Answer, ¶ 7 [emphasis added].) Demurrer overruled.

Demurrer to Eighth Affirmative Defense
(1) Code Civ. Proc., § 430.20 subd. (a): *Failure to Mitigate Damages*
A plaintiff may not recover damages that could have been avoided if reasonable and appropriate mitigation efforts within the plaintiff's means had been taken. (*Steelduct Co. v. Henger–Seltzer Co.* (1945) 26 Cal.2d 634, 649; *Englert v. IVAC Corp.* (1979) 92 Cal.App.3d 178, 189.)

Where the complaint is silent as to the steps Plaintiff has taken to mitigate damages, the defense must be affirmatively alleged with new matter showing that plaintiff could have mitigated but did not. (*Erler v. Five Points Motors* (1967) 249 Cal.App.2d 560, 568; *Hawaiian Pineapple Co. v. Eckert Engineering Corp.* (1954) 129 Cal.App.2d 371.)

Here, there are no facts in the FAC to indicate mitigation. Therefore, to adequately assert failure to mitigate, Defendant must plead new matter *using* ultimate facts, not legal conclusions. Defendant fails to do so. Demurrer sustained.

(2) Code Civ. Proc., § 430.20 subd. (b): *defense does not refer to cause of action*
Here, Defendant does not *explicitly* specify which causes of action this defense applies to. However, it is obvious that it applies to all causes of action. It states, "Plaintiffs have failed… to mitigate the damage alleged in the First Amended Complaint." (Answer, ¶ 8 [emphasis added].) Demurrer overruled.

Demurrer to Ninth Affirmative Defense
(1) Code Civ. Proc., § 430.20 subd. (a): *Justification*
Justification is a defense that acknowledges at least a portion of the conduct of which the plaintiff complains but asserts that the defendant's conduct was authorized or sanctioned by law. (*Moore v. Conliffe* (1994) 7 Cal.4th 634.)

Justification must be asserted as an affirmative defense in the answer unless it appears on the face of the complaint. (*Herron v. State Farm Mutual Ins. Co*. (1961) 56 Cal.2d 202, 207; *A.F. Arnold & Co. v. Pacific Professional Ins., Inc.* (1972) 27 Cal.App.3d 710, 713–14 & n.2.)

Here, there are no facts in the FAC to support justification. Therefore, to adequately assert justification, Defendant must plead new matter *using* ultimate facts, not legal conclusions. Defendant fails to do so. Demurrer sustained.

(2) Code Civ. Proc., § 430.20 subd. (b): *defense does not refer to cause of action*
Here, Defendant does not *explicitly* specify which causes of action this defense applies to. However, it is obvious that it applies to all causes of action. It applies to "any of the acts, conduct or statements attributed to it by the First Amended Complaint." (Answer, ¶ 9 [emphasis added].) Demurrer overruled.

(3) Code Civ. Proc., § 430.20 subd. (b): *defense is duplicative*
Although many Courts use the terms *privilege* and *justification* interchangeably, they are different. (*Aalgaard v. Merchants Nat'l Bank, Inc.* (1990) 224 Cal.App.3d 674, 683 n.6; *Environmental Planning & Information Council v. Superior Court* (1984) 36 Cal.3d 188, 194 n.3.) Privilege is statutory and generally applicable to defamation. (Code Civ. Proc., § 47.) Justification is non statutory and applies to virtually all torts. (*Imperial Ice Co. v. Rossier* (1941) 18 Cal.2d 33.) Demurrer overruled.

Demurrer to Tenth Affirmative Defense
(1) Code Civ. Proc., § 430.20 subd. (a): *Performance/Discharge*
- Performance
Full performance of an obligation, by the party whose duty it is to perform it, or by any other person on his behalf, and with his assent, if accepted by the creditor, extinguishes it. (Civ. Code § 1473.)

Performance by payment may be raised by denial. (*Davanay v. Eggenhoff* (1872) 43 Cal. 395, 397; *Bank of Shasta v. Boyd* (1893) 99 Cal. 604, 606; *Snodgrass v. Snodgrass* (1927) 81 Cal.App. 360, 363.)

Defendant adequately asserts performance via *traverse*. Demurrer overruled.

- Discharge
Besides performance, contractual obligations can be discharged in several other ways (e.g. termination, cancellation, recession, release, accord and satisfaction, novation, modification, or account stated [1 Witkin, Summary 10th Contracts § 924 (2005)].)

Discharge of a previously accrued liability must be must be specially pleaded. (*Landis v. Morrissey* (1886) 69 Cal. 83, 86.)

To adequately assert discharge, Defendant must plead new matter *using* ultimate facts, not legal conclusions. Defendant fails to do so. Demurrer sustained.

(2) Code Civ. Proc., § 430.20 subd. (b): *defense does not refer to cause of action*
Here, Defendant does not *explicitly* specify which causes of action these defenses apply to. However, it is obvious that they apply to all causes of action. They apply to "[A]ny duty or obligation, contractual or otherwise that the Plaintiffs claim is owed." (Answer, ¶ 10 [emphasis added].) Demurrer overruled.

(3) Code Civ. Proc., § 430.20 subd. (b): *defense is duplicative*
Unlike discharge and performance, an accord does not require full performance of an obligation. Rather, it is an *agreement* to accept, in extinction of an obligation, something *different from or less than* that to which the person agreeing to accept is entitled. (Civ. Code § 1521.) Demurrer overruled.

Demurrer to Eleventh Affirmative Defense
(1) Code Civ. Proc., § 430.20 subd. (a): *Unclean Hands*
When a party who seeks to set judicial machinery in motion and obtain some remedy, has violated conscience, good faith or other equitable principle in his prior conduct, then the doors of the court will be shut against him; the court will refuse to interfere on his behalf to acknowledge his right, or to afford him any remedy. (Civ. Code § 3517; *Lynn v. Duckel* (1956) 46 Cal.2d 845, 850; *Moriarty v. Carlson* (1960) 184 Cal.App.2d 51, 55; *Stockton v. Ortiz* (1975) 47 Cal.App.3d 183, 200.)

Unclean hands must be asserted as an affirmative defense in the answer unless it appears on the face of the complaint. (*Allstead v. Laumeister* (1911) 16 Cal.App. 59, 62; *Fibreboard Paper Products Corp. v. East Bay Union of Machinists* (1964) 227 Cal.App.2d 726; *Santoro v. Carbone* (1972) 22 Cal.App.3d 721, 731, disapproved on other grounds in *Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18.)

Here, there are no facts in the FAC to support unclean hands. Therefore, to adequately assert unclean hands, Defendant must plead new matter *using* ultimate facts, not legal conclusions. Defendant fails to do so. Demurrer sustained.

(2) Code Civ. Proc., § 430.20 subd. (b): *defense does not refer to cause of action*
Here, Defendant clearly asserts that this defense applies to "each cause of action of the First Amended Complaint." (Answer, ¶ 11.) Demurrer overruled.

(3) Code Civ. Proc., § 430.20 subd. (b): *defense is duplicative*
Unclean hands differs from fault of third parties, comparative fault of third parties, and apportionment. Unclean hands only applies to Plaintiffs conduct whereas comparative fault applies to third parties as well. (*Hernandez v. County of Los Angeles* (2014) 226 Cal.App.4th 1599, 1614; *Fredette v. City of Long Beach* (1986) 187 Cal.App.3d 122, 133; *Marquis v. St. Louis–San Francisco Ry.* (1965) 234 Cal.App.2d 335, 340.) Demurrer overruled.

Demurrer to Twelfth Affirmative Defense
(1) Code Civ. Proc., § 430.20 subd. (a): *Conclusory Terms-Reservation of Rights - Conclusory Terms*
A valid cause of action cannot be stated using conclusory terms. (*McCaughey v. Schuette* (1897) 117 Cal. 223; *Metropolis Trust & Savings Bank v. Monnier* (1915) 169 Cal.

592, 596; *Clement v. Dunn* (1931) 114 Cal.App. 60, 63; *Thompson v. Purdy* (1931) 117 Cal.App. 565, 567; *Foerst v. Hobro* (1932) 125 Cal.App. 476; *Smith v. Bentson* (1932) 127 Cal.App.Supp. 789; *Callaway v. Novotny* (1932) 128 Cal.App. 166, 169; *Sklar v. Franchise Tax Bd.* (1986) 185 Cal.App.3d 616, 621.) However, it is unnecessary to assert the defense of failure to state a cause of action because it is not waived by omission. (Code of Civ. Proc., § 430.80; *In re Christopher C.* (2010) 182 Cal.App.4th 73.) Demurrer overruled.

- Reservation of Rights
The proper method for adding additional defenses is outlined in Code of Civil Procedure section 464 subd. (a). (see also *People ex rel. Dept. Pub. Wks. v. Douglas* (1971) 15 Cal.App.3d 814.)

Here, Defendant asserts his right to add additional defenses as an affirmative defense. This is improper. Demurrer sustained.

(2) Code Civ. Proc., § 430.20 subd. (b): *defense does not refer to cause of action*
Here, Defendant clearly asserts that this defense applies to "[T]he First Amended Complaint and each cause of action contained therein." (Answer, ¶ 12.) Demurrer overruled.

(3) Code Civ. Proc., § 430.20 subd. (b): *defense is duplicative*
Here, Defendant asserts reservation of rights twice, both times lacking new matter. (Answer, ¶ 26.) It is therefore impossible to determine how they differ. Demurrer sustained.

Demurrer to Thirteenth Affirmative Defense
(1) Code Civ. Proc., § 430.20 subd. (a): *Fault of Third Parties*
Comparative fault or comparative or contributory negligence is conduct by the plaintiff that falls below the standard of care that the plaintiff is legally required to maintain under the particular circumstances at issue and that constitutes a contributing cause of the injury for which the plaintiff seeks damages from the defendant. (*Sagadin v. Ripper* (1985) 175 Cal.App.3d 1141, 1161 n.8; *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 809; *Gyerman v. United States Lines Co.* (1972) 7 Cal.3d 488, 500.)

Comparative fault requires special pleading unless the defense appears in the complaint. (*Kenny v. Kennedy* (1908) 9 Cal.App. 350, 351; *Swink v. Gardena Club* (1944) 65 Cal.App.2d 674, 680; *Gerfers v. San Diego Transit System* (1954) 126 Cal.App.2d 733, 735.) Further, if the defense is that the negligence of another affects the plaintiff's right to recover, a plea of contributory negligence is not enough. The answer must allege the relationship or circumstances of agency, joint venture, control, etc., that call for the imputation of contributory negligence. (*Campagna v. Market Street Ry. Co.* (1944) 24 Cal.2d 304, 307; *Travis v. Southern Pac. Co.* (1962) 210 Cal.App.2d 410, 427.)

Here, there are no facts in the FAC even suggesting comparative fault. Therefore, to adequately assert comparative fault, Defendant must plead new matter *using* ultimate facts, not legal conclusions. Defendant fails to do so. Demurrer sustained.

(2) Code Civ. Proc., § 430.20 subd. (b): *defense does not refer to cause of action*
Here, Defendant does not *explicitly* specify which causes of action this defense applies to. However, it is obvious that it applies to all causes of action. It applies to "[T]he acts and/or omissions complained of by Plaintiffs." (Answer, ¶ 13.) Demurrer overruled.

(3) Code Civ. Proc., § 430.20 subd. (b): *defense is duplicative*
Here, Defendant asserts *this defense* two additional times, each lacking new matter. (Answer, ¶¶ 15, 19.) It is therefore impossible to determine how they differ. Demurrer sustained as to Comparative Fault of Third Parties (Answer, ¶ 15) and Apportionment (Answer, ¶ 19). Demurrer overruled as to Unclean Hands (Answer, ¶ 11)—see Demurrer to Eleventh Affirmative Defense (3).

Demurrer to Fifteenth Affirmative Defense
(1) Code Civ. Proc., § 430.20 subd. (a): *Comparative Fault of Third Parties*
See Demurrer to Thirteenth Affirmative Defense (1). Demurrer sustained.

(2) Code Civ. Proc., § 430.20 subd. (b): *defense does not refer to cause of action*
Here, Defendant does not *explicitly* specify which causes of action this defense applies to. However, it is obvious that it applies to all causes of action. It states, "any award made in favor of the Plaintiffs in this case must be reduced." (Answer, ¶ 15 [emphasis added].) Demurrer overruled.

(3) Code Civ. Proc., § 430.20 subd. (b): *defense is duplicative*
Here, Defendant asserts *this defense* two additional times, each lacking new matter. (Answer, ¶ 13, 19.) It is therefore impossible to determine how they differ. Demurrer sustained as to Fault of Third Parties (Answer, ¶ 13) and Apportionment (Answer, ¶ 19). Demurrer overruled as to Unclean Hands (Answer, ¶ 11)—see Demurrer to Eleventh Affirmative Defense (3).

Demurrer to Sixteenth Affirmative Defense
(1) Code Civ. Proc., § 430.20 subd. (a): *Offset*
A defendant may offset sums owing to the plaintiff against sums owing from plaintiff to defendant, with the result that the offsetting amounts are cancelled and the defendant is obligated to pay plaintiff only the net amount, if any. (*Harrison v. Adams* (19742) 20 Cal.2d 646, 648; *California Canning Peach Growers v. Williams* (1938) 11 Cal.2d 233, 240–41; *Hughes Tool Co. v. Max Hinrichs Seed Co.* (1980) 112 Cal.App.3d 194, 199–200.)

A claim of setoff is generally asserted in the answer with other defenses. (*Title Ins. Co. of Minnesota v. State Board of Equalization* (1992) 4 Cal.4th 715, 731; *Wallace v. Bear River Water & Mining Co.* (1861) 18 Cal. 461, 464; *Bernard v. Mullott* (1851) 1 Cal. 368; *American Nat'l Bank v. Stanfill* (1988) 205 Cal.App.3d 1089, 1097; *McDaniel v. City & County of San Francisco* (1968) 259 Cal.App.2d 356, 364; *Kramer v. Associated Almond Growers* (1931)111 Cal.App. 595, 600–601.) The facts supporting the setoff must be set forth with essentially the same format and detail as a cause of action. (Code Civ. Proc., § 431.70; *Wallace, supra* 18 Cal. 461 at pp. 464–465.)

To adequately assert setoff, Defendant must plead new matter *using* ultimate facts, not legal conclusions. Defendant fails to do so. Demurrer sustained.

(2) Code Civ. Proc., § 430.20 subd. (b): *defense does not refer to cause of action*
Here, Defendant does not *explicitly* specify which causes of action this defense applies to. However, it is obvious that it applies to all causes of action. It states, "any liability must be offset." (Answer, ¶ 16 [emphasis added].) Demurrer overruled.

Demurrer to Seventeenth Affirmative Defense
(1) Code Civ. Proc., § 430.20 subd. (a): *Privilege*
One who otherwise would be liable for a tort is not liable if he acts in pursuance of and within the limits of a privilege of his own or of a privilege of another that was properly delegated to him. (*Gilmore v. Superior Court* (1991) 230 Cal.App.3d 416, 421.)

Privilege must be asserted as an affirmative defense in the answer (*Layne v. Kirby* (1930) 208 Cal. 694, 697; *Cameron v. Wernick* (1967) 251 Cal.App.2d 890, 894; *Morris v. National Federation of the Blind* (1961) 192 Cal.App.2d 162, 164; *Jones v. Express Publishing Co.* (1927) 87 Cal.App. 246, 255–56.)

To adequately assert privilege, Defendant must plead new matter *using* ultimate facts, not legal conclusions. Defendant fails to do so. Demurrer sustained.

(2) Code Civ. Proc., § 430.20 subd. (b): *defense does not refer to cause of action*
Here, Defendant does not *explicitly* specify which causes of action this defense applies to. However, it is obvious that it applies to all causes of action. It states, "Defendant was privileged in doing any/or all of the acts alleged in the First Amended Complaint." (Answer, ¶ 17 [emphasis added].) Demurrer overruled.

(3) Code Civ. Proc., § 430.20 subd. (b): *defense is duplicative*
See Demurrer to Ninth Affirmative Defense (3). Demurrer overruled.

Demurrer to Nineteenth Affirmative Defense
(1) Code Civ. Proc., § 430.20 subd. (a): *Apportionment*
See Demurrer to Thirteenth Affirmative Defense (1). Demurrer sustained.

(2) Code Civ. Proc., § 430.20 subd. (b): *defense does not refer to cause of action*
Here, Defendant does not *explicitly* specify which causes of action this defense applies to. However, it is obvious that it applies to all causes of action. It applies "if damages were suffered … as alleged in the First Amended Complaint." (Answer, ¶ 19 [emphasis added].) Demurrer overruled.

(3) Code Civ. Proc., § 430.20 subd. (b): *defense is duplicative*
Here, Defendant asserts *this defense* two additional times, each lacking new matter. (Answer, ¶ 13, 15.) It is therefore impossible to determine how they differ. Demurrer sustained as to Fault of Third Parties (Answer, ¶ 13) and Comparative Fault (Answer, ¶ 15). Demurrer overruled as to Unclean Hands (Answer, ¶ 11)—see Demurrer to Eleventh Affirmative Defense (3).

Demurrer to Twentieth Affirmative Defense
(1) Code Civ. Proc., § 430.20 subd. (a): *Damages Not Foreseeable*
Foreseeability is an element of negligence. It is used to determine the existence and scope of a duty. (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 398-399, 403; *Summit Fin'l Holdings, Ltd. v. Continental Lawyers Title Co.* (2002) 27 Cal.4th 705, 715.) Failure to allege foreseeability is a valid defense to negligence. (*Baldwin v. Marina City Properties, Inc.* (1978) 79 Cal.App.3d 393, 410; *Stafford v. Ballinger* (1962) 199 Cal.App.2d 289, 292.)

Here, Plaintiffs do not plead negligence. Therefore, to adequately assert that damages were not foreseeable, Defendant must plead new matter *using* ultimate facts, not legal conclusions. Defendant fails to do so. Demurrer sustained.

(2) Code Civ. Proc., § 430.20 subd. (b): *defense does not refer to cause of action*
Here, Defendant does not *explicitly* specify which causes of action this defense applies to. However, it is obvious that it applies to all causes of action. It applies to "the damages asserted in the First Amended Complaint." (Answer, ¶ 20 [emphasis added].) Demurrer overruled.

Demurrer to Twenty-Sixth Affirmative Defense
(1) Code Civ. Proc., § 430.20 subd. (a): *Accord and Satisfaction*
Accord and satisfaction is the substitution of a new agreement for and in satisfaction of a pre-existing agreement between the same parties. (Civ. Code § 1521; *Moving Picture Machine Operators Union v. Glasgow Theaters, Inc*. (1970) 6 Cal.App.3d 395, 402; *B. & W. Engineering Co. v. Beam* (1913) 23 Cal.App. 164, 170; *In re Marriage of Thompson* (1996) 41 Cal.App.4th 1049, 1058–59; *Security First Nat'l Bank v. Rospaw* (1951) 107 Cal.App.2d 220, 223–24.)

Accord and Satisfaction is a special defense and must be pleaded. (*Hansen v. Fresno Jersey Farm Dairy Co.* (1934) 220 Cal. 402, 409; *Southern California Disinfecting Co. v. Lomkin* (1960) 183 Cal.App.2d 431, 444; *Owens v. Noble* (1946) 77 Cal.App.2d 209, 215; *Peal v. Gulf Red Cedar Co.* (1936) 15 Cal.App.2d 196, 199.) The pleading should contain the facts underlying the accord, demonstrating the existence of each of the elements of a contract and, in addition, the facts demonstrating full performance and resulting satisfaction. As to satisfaction, the pleading should allege first the parties' agreement as to what conduct is required to constitute execution; that is, the execution of the accord either through performance of an act or through the making of a promise; and second, the happening of the required conduct. (*Silvers v. Grossman* (1920) 183 Cal. 696, 700, disapproved on other grounds in *Mix v. Yoakum* (1927) 200 Cal. 681; *Riskas v. De La Montanya* (1956) 145 Cal.App.2d 636, 639–40; *Doran v. Dreyer* (1956) 143 Cal.App.2d 289, 291–92.)

To adequately assert accord and satisfaction, Defendant must plead new matter *using* ultimate facts, not legal conclusions. Defendant fails to do so. Demurrer sustained.

(2) Code Civ. Proc., § 430.20 subd. (b): *defense does not refer to cause of action*
Here, Defendant does not *explicitly* specify which causes of action this defense applies to. However, it is obvious that it applies to all causes of action. It states, "Plaintiff's First Amended Complaint is barred." (Answer, ¶ 26 [emphasis added].) Demurrer overruled.

(3) Code Civ. Proc., § 430.20 subd. (b): *defense is duplicative*
See Demurrer to Tenth Affirmative Defense (3). Demurrer overruled.

(4) Code Civ. Proc., § 430.20 subd. (c): *failure to assert if contract is oral or written*
Here, Defendant does not plead whether the accord was oral or written. Demurrer sustained.

Demurrer to Twenty-Seventh Affirmative Defense
(1) Code Civ. Proc., § 430.20 subd. (a): *Void for Vagueness/Ambiguity*
Under California law, for a contact to be formed, the contract terms must be clear enough that the parties can understand what each is required to do. (Civ. Code § 1550; *Hynix Semiconductor Inc. v. Rambus Inc.,* 441 F.Supp.2d 1066 (N.D.Cal. 2006).)

Invalidating circumstances, such as lack of consent, that make the purported contract wholly void may be raised by denial. (see e.g. *Leo F. Piazza Paving Co. v. Bebek & Brkich* (1956) 141 Cal.App.2d 226, 232; *Lever v. Garoogian* (1974) 41 Cal.App.3d 37, 39.)

Here, Defendant adequately asserts a *traverse* to Plaintiffs' allegations in cause of action one, breach of contract. Demurrer overruled.
(2) Code Civ. Proc., § 430.20 subd. (b): *defense does not refer to cause of action*
Here, Defendant does not *explicitly* specify which causes of action this defense applies to. However, it is obvious that when the Defendant refers to "the contract claimed" (Answer, ¶ 27), it is in reference to cause of action one, since Plaintiff only pleads one cause of action for breach of contract. Demurrer overruled.

(4) Code Civ. Proc., § 430.20 subd. (c): *failure to assert if contract is oral or written*
This defense applies to the oral contract asserted by Plaintiff (see Demurrer to Twenty-Seventh Affirmative Defense (2).) Demurrer overruled.

Demurrer to Twenty-Eighth Affirmative Defense
(1) Code Civ. Proc., § 430.20 subd. (a): *Further Affirmative Defenses*
See Demurrer to Twelfth Affirmative Defense. Demurrer sustained.

(2) Code Civ. Proc., § 430.20 subd. (b): *defense does not refer to cause of action*
Here, Defendant does not *explicitly* specify which causes of action this defense applies to. However, it is obvious that it applies to the entire "First Amended Complaint." (Answer, p7 ¶ 26 [sic].) Demurrer overruled.

MOTION TO STRIKE

Seventh Affirmative Defense
- Attorney's Fees
Demurrer to the Seventh Affirmative Defense, concerning Attorney's Fees is sustained, so this issue is ordered off calendar.

- Costs

Generally, the "prevailing party" is entitled *as a matter of right* to recover costs of suit in any action or proceeding. (Code Civ. Proc., § 1032(b); *Santisas v. Goodin* (1998) 17 Cal.4th 599, 606; *Plancich v. United Parcel Service, Inc.* (2011) 198 Cal.App.4th 308, 312-314.) Therefore, Defendant's assertion that Plaintiffs are not entitled to costs is the same as a general denial, which is *always* relevant and allowed. Here Defendant's denial conforms to Code of Civil Procedure section 431.30. Motion to strike denied.

Prayer for Attorney's Fees

"Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties." (Code Civ. Proc., § 1021; *Covenant Mutual Ins. Co. v. Young* (1986) 179 Cal.App.3d 318, 321.)

Here, Defendant's prayer seeks attorneys' fees. (Answer p. 7, ¶ 3.) However, there is no statutory basis to support the request and neither the FAC nor the Answer allege any agreement between the parties pertaining to attorney's fees. And Defendant does not oppose Plaintiffs' motion on this basis. (Opposition, filed 10/5/16 p6, ¶ III (B).) Motion to strike granted.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: MWS on 10/18/16

(Judge's initials) (Date)

(28) **Tentative Ruling**

Re: ***Vasquez, et al. v. OR Express Logistics, et al.***

Case No. 15CECG03738

Hearing Date: October 19, 2016 (Dept. 501)

Motion: By Defendant Daimler Truck North America, LLC to dismiss Plaintiff's complaint and for sanctions in the amount of $1,620.00.

Tentative Ruling:

To deny the motion for terminating sanctions. To grant the request for monetary sanctions in the amount of $ 1,620.00 against Plaintiff and Plaintiff's counsel, jointly and severally.

Explanation:

Defendant Daimler Truck North America, LLC ("DTNA") has moved for terminating sanctions on the grounds that Plaintiff failed to comply with the Court's order issued August 11, 2016. Defendant specifically requests that the entire action be dismissed pursuant to Code of Civil Procedure §2023.030.

Section 2023.010 describes activities that constitute "misuse of the discovery process," including, as relevant here,

> "(c) Employing a discovery method in a manner or to an extent that causes unwarranted annoyance, embarrassment, or oppression, or undue burden and expense.
> (d) Failing to respond or to submit to an authorized method of discovery. [¶¶]
> (g) Disobeying a court order to provide discovery."

Section 2023.030 provides:

> "To the extent authorized by the chapter governing any particular discovery method or any other provision of this title, the court, after notice to any affected party, person, or attorney, and after opportunity for hearing, may impose the following sanctions against anyone engaging in conduct that is a misuse of the discovery process:

(a) The court may impose a monetary sanction ordering that one engaging in the misuse of the discovery process, or any attorney advising that conduct, or both pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct. The court may also impose this sanction on one unsuccessfully asserting that another has engaged in the misuse of the discovery process, or on any attorney who advised that assertion, or on both. If a monetary sanction is authorized by any provision of this title, the court shall impose that sanction unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.
(b) The court may impose an issue sanction ordering that designated facts shall be taken as established in the action in accordance with the claim of the party adversely affected by the misuse of the discovery process. The court may also impose an issue sanction by an order prohibiting any party engaging in the misuse of the discovery process from supporting or opposing designated claims or defenses.
(c) The court may impose an evidence sanction by an order prohibiting any party engaging in the misuse of the discovery process from introducing designated matters in evidence.
(d) The court may impose a terminating sanction by one of the following orders:
(1) An order striking out the pleadings or parts of the pleadings of any party engaging in the misuse of the discovery process.
(2) An order staying further proceedings by that party until an order for discovery is obeyed.
(3) An order dismissing the action, or any part of the action, of that party.
(4) An order rendering a judgment by default against that party."

A terminating sanction is within the Court's discretion for a party's violation of discovery orders. (*Lang v. Hochman* (2000) 77 Cal.App.4th 1225, 1244.) Only two facts are a prerequisite for an imposition of a sanction, "(1) there must be a failure to comply . . . and (2) the failure must be willful." (*Liberty Mut. Fire Ins. Co. v. LcL Administrators, Inc.* (2008) 163 Cal.App.4th 1093, 1102.)

However, the purpose of discovery sanctions is to enable the propounding party to obtain the information sought rather than simply to punish a disobedient party or lawyer. (*Shanooni v. Super Shuttle of Los Angeles* (1993) 20 Cal.App.4th 256, 262.) A secondary purpose is to compensate the interrogating party for costs and fees incurred in enforcing discovery. (*Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 796.)

Here, Plaintiff has provided discovery responses, served after the present motion was filed. Defendant asserts that the responses are insufficient. The Court does have jurisdiction to consider such issues. (*Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 406-08.) However, these arguments are-by necessity- first raised on the reply brief. Further, given that there appear to be some documents produced, and some substantive responses for several of the

requests, Defendant's contentions are better resolved on a future motion if the meet and confer process cannot resolve such issues.

In the reply brief, Defendant also makes the point that the opposition was filed late and requests that the opposition be stricken. The Court has "broad discretion" to consider late-filed papers. (*Rancho Mirage Country Club Homeowners Assoc. v. Hazelbaker* (2016) 2 Cal.App.5th 252, 261-62.) Here, where the opposition is simply to indicate that substantive responses have been provided, there is little, if any, prejudice to the moving party; the goal of the motion has been met. While Plaintiff would have been better served to provide some good-cause explanation for the late-filed papers, under the circumstances the Court will consider the opposition.

The Court will award sanctions to Defendant for having to bring this motion. Plaintiff asked that this Court reduce the award of fees but provided no basis for that reduction. Counsel for Defendant indicates that he spent 3.5 hours working on the initial motion, and expected to work a further 3 hours on the reply brief and any hearing at a rate of $240.00 per hour. The Court will award the full amount of sanctions against Plaintiffs in the amount of $1,560, plus a further $60.00 for the filing fee for this motion, for a total of $1,620.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 10/18/16
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***Mireya Lopez v. Allstate Indemnity Company***
Superior Court Case No. 16 CECG 02203

Hearing Date: October 19, 2016 **(Dept. 501)**

Motion: Compel Appraisal and stay action

Tentative Ruling:

To grant the motion pursuant to CCP § 1281.2 and appoint Appraisal Express, P.O. Box 925 Torrance, CA 935087-0925 as the appraiser. Allstate is ordered to pay for the costs of the appraisal.

To stay the action pending the completion of the appraisal. Within 30 days of the completion, any party may contact the Court to calendar a case management conference.

Explanation:

Background

On April 25, 2016, Plaintiff reported the theft of her vehicle, a 2000 Chevy Tahoe SUV to Fresno Police and to her insurer, Allstate. The insurer valued the loss at $5100. Plaintiff believes that the value of her vehicle exceeds $8000.

On July 11, 2016, Plaintiff, representing herself, filed a complaint alleging a cause of action for negligence and a cause of action for violation of Bus. & Prof. Code § 172000 et seq. Defendant filed an Answer on August 11, 2016.

On September 21, 2016, Allstate filed a motion to compel appraisal and to stay the action pending the resolution of the appraisal. No opposition was filed.

Merits

The California Code of Civil Procedure provisions relating to arbitration apply to appraisals under insurance policies. [Code Civ. Proc., § 1280 (a); *Jefferson Ins. Co. v. Superior Court* (1970) 3 Cal. 3d 398, 401; *Appalachian Insurance Co. v. Rivcom Corp.* (1982) 130 Cal. App. 3d 818, 824] Here, the moving party has shown the policy at issue contained a provision for the appraisal of a loss in the event of a disagreement between the insured and the insurer. See Declaration of Glen Davis, Senior Products Consultant at ¶ 4 and Exhibit A attached thereto. The policy itself states at page 21:

Right To Appraisal

Both you and Allstate have a right to demand an

appraisal of the loss. Each will appoint and pay a qualified appraiser. Other appraisal expenses will be shared equally. The two appraisers, or a judge of a court of record, will choose an umpire. Each appraiser will state the actual cash value and the amount of loss. If they disagree, they'll submit their differences to the umpire. A written decision by any two of these three persons will determine the amount of the loss.

The requirements of CCP § 1281.2 have been met. The motion will be granted.

Pursuant to California Rules of Court, Rule 391(a) and Code of Civil Procedure § 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 10/18/16
(Judge's initials) (Date)

(17) **Tentative Ruling**

Re: ***State of California v. Derrel's Mini Storage, L.P., et al.***
Court Case No. 15 CECG 01554

Hearing Date: October 19, 2016 (Dept. 501)

Motion: Ex parte Application by Derrel's Mini Storage, L.P. for Withdrawal of Probable Compensation

Tentative Ruling:

To continue the hearing to November 2, 2016 at 3:30 p.m. in Department 501.

Explanation:

The court deems it more convenient to hear both applications to withdraw the probable compensation together.

Pursuant to Califonia Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 10/18/16
(Judge's initials) (Date)

Tentative Rulings for Department 502

(24) **Tentative Ruling**

Re: ***Maxwell v. Crawford & Company***
Court Case No. 16CECG02457

Hearing Date: **October 19, 2016 (Dept. 502)**

Motion: Applications of Joseph M. English and Steven J. Whitehead to Appear as Counsel *Pro Hac Vice* for Defendants

Tentative Ruling:

To grant both applications. Applicants have satisfied the requirements of California Rules of Court, Rule 9.40.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 10/18/16
(Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***Saint-Fleur v. County of Fresno***
Superior Court Case No.: 13CECG00838

Hearing Date: October 19, 2016 (**Dept. 502**)

Motion: By Plaintiff for attorney's fees pursuant to Public Records Act

Tentative Ruling:

To grant, in part, with Plaintiff to submit a declaration of counsel and detailed billing records dated between December 21, 2015, and the filing of the reply on this motion, due November 9, 2016, with Defendant to file any objections to the declaration/amounts no later than November 23, 2016. The Court will issue an order after hearing.

If oral argument is requested, the hearing will be held on October 26, 2016 at 3:30 p.m. in Dept. 502.

Explanation:

Government Code section 6258 provides:

> Any person may institute proceedings for injunctive or declarative relief or writ of mandate in any court of competent jurisdiction to enforce his or her right to inspect or to receive a copy of any public record or class of public records under this chapter. The times for responsive pleadings and for hearings in these proceedings shall be set by the judge of the court with the object of securing a decision as to these matters at the earliest possible time.

The Public Records Act sets the exclusive procedure for the enforcement of its provisions, with the initial determinations and prerequisites being solely determined by the court, not a party. Specifically:

> (a) Whenever it is made to appear by verified petition to the superior court of the county where the records or some part thereof are situated that certain public records are being improperly withheld from a member of the public, the court shall order the officer or person charged with withholding the records to disclose the public record or show cause why he or she should not do so. The court shall decide the case after examining the record in camera, if permitted by subdivision (b) of Section 915 of the Evidence Code, papers filed by the parties and any oral argument and additional evidence as the court may allow.
>
> (Gov. Code, § 6259, subd. (a).)

If this hurdle is met, the judge then establishes the briefing schedule and hearings with the object of securing a decision at the earliest possible time. (Gov. Code, § 6258.)

> (b) If the court finds that the public official's decision to refuse disclosure is not justified under Section 6254 or 6255, he or she shall order the public official to make the record public. If the judge determines that the public official was justified in refusing to make the record public, he or she shall return the item to the public official without disclosing its content with an order supporting the decision refusing disclosure.
>
> (c) In an action filed on or after January 1, 1991, an order of the court, either directing disclosure by a public official or supporting the decision of the public official refusing disclosure, is not a final judgment or order within the meaning of Section 904.1 of the Code of Civil Procedure from which an appeal may be taken, but shall be immediately reviewable by petition to the appellate court for the issuance of an extraordinary writ. Upon entry of any order pursuant to this section, a party shall, in order to obtain review of the order, file a petition within 20 days after service upon him or her of a written notice of entry of the order, or within such further time not exceeding an additional 20 days as the trial court may for good cause allow. If the notice is served by mail, the period within which to file the petition shall be increased by five days. A stay of an order or judgment shall not be granted unless the petitioning party demonstrates it will otherwise sustain irreparable damage and probable success on the merits. Any person who fails to obey the order of the court shall be cited to show cause why he or she is not in contempt of court.
>
> (d) The court shall award court costs and reasonable attorney fees to the plaintiff should the plaintiff prevail in litigation filed pursuant to this section. The costs and fees shall be paid by the public agency of which the public official is a member or employee and shall not become a personal liability of the public official. If the court finds that the plaintiff's case is clearly frivolous, it shall award court costs and reasonable attorney fees to the public agency. (Gov. Code, § 6259, subd. (b)-(d).)

The standard test for determining if the Petitioner prevailed is whether or not the litigation caused it to release a previously-withheld document. (*Galbiso v. Orosi Public Utility District* (2008) 167 Cal.App.4th 1063.) Here, there was no production pursuant to the Public Records Act until May 2016. Moreover, until then, the County maintained an objection that some of the records were covered by a privilege applicable to personnel information and so Plaintiff had no way of knowing whether or not all of the records requested had been turned over. The court thus finds Petitioner is the prevailing party.

Concerning the amount of an award of attorney's fees costs, the court is not required to make an award of attorney's fees in an amount commensurate with the prevailing party's success in the litigation. (*Bernardi v. County of Monterey* (2008) 167 Cal.App.4th 1379.) The absence of billing records detailing the hours spent and services

provided does not preclude that counsel claimed a reasonable number of hours for work performed. (*Ibid.*)

This lawsuit is not a petition brought under the Public Records Act – it is a civil complaint seeking damages for defamation with a Public Records Act request not tacked on to the litigation until after it was filed. Consequently, the $34,157.50 in attorney's fees Plaintiff incurred prior to December 21, 2015, is not compensable as related to the Public Records Act Request. As for the $17,150.60 incurred post-December 21, 2015, the Court wishes to review detailed billing records in order to determine a reasonable fee for prevailing.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 10/18/16
(Judge's initials) (Date)

Tentative Rulings for Department 503

(17) **Tentative Ruling**

Re: ***Chakmak v. Al's Autoworld, Inc. dba Porsche of Fresno, et al.***
Court Case No. 16 CECG 02259

Hearing Date: October 19, 2016 (Dept.503)

Motion: Motion for Change of Venue

Tentative Ruling:

To deny without prejudice.

Explanation:

Code of Civil Procedure section 397, subdivision (c), gives the court discretion to change venue if it would promote the convenience of witnesses and the ends of justice. Defendants contend that because venue is proper in Fresno, the case was specifically transferred to Fresno, and that transfer was unsuccessfully challenged by writ, the case should stay in Fresno. However, it is proper to entertain a motion for change of venue based on the convenience of witnesses, after granting a motion to change venue based on the right of the defendants to be sued in the county of their residence. (See *Woods v. Berry* (1931) 111 Cal.App. 675, 682–83.)

Defendants further contend that they and their employees would be equally inconvenienced by transferring this matter to Orange County, but a court cannot consider the convenience of the parties absent "extraordinary circumstances" i.e., when the party's health has deteriorated to such an extent that they cannot travel to attend trial in the proper venue. (*Simonian v. Simonian* (1950) 97 Cal.App.2d 68, 69; see also *Lieppman v. Lieber* (1986) 180 Cal.App.3d 914, 401.) The convenience of the employees of the parties is not to be considered on a motion for change of venue. (*International Inv. Co. v. Merola* (1959) 175 Cal.App.2d 439, 446.)

To prevail on a motion for change of venue under section 397, subdivision (c), the moving party must demonstrate that both the convenience of witnesses and the interests of justice would be served by such a transfer. (*Corfee v. Southern California Edison* (1962) 202 Cal.App.2d 473; *Churchill v. White* (1953) 119 Cal.App.2d 503.) The burden is entirely upon the moving party to prove the need for a change of venue. (*Union Trust Life Ins. Co. v. Superior Court* (1968) 259 Cal.App.2d 23, 28.)

A motion for change of venue based on witness convenience must be supported by competent declarations naming the witnesses to be called and the nature and relevance of their testimony, and explain why the current forum is inconvenient. (*Silva v. Superior Court* (1981) 119 Cal. App. 3d 301, 305; *Buran Equipment Co. v. Superior Court* (1987) 190 Cal. App. 3d 1662, 1667; *Tutor-Saliba-Perini Joint*

Venture v. Superior Court (1991) 233 Cal. App. 3d 736, 744.) A motion based upon generalities, conclusions, and hearsay affidavits is defective and may not be considered. (*Lieppman v. Lieber*, *supra*, 180 Cal.App.3d at pp. 919-20.) The affidavits used on the motion must be specific as to the facts to which the witnesses will testify. (*Braunstein v. Superior Court* (1964) 225 Cal.App.2d 691, 698.) The motion must be denied where the prospective witnesses' testimony is not material, or is merely cumulative, or is of slight importance in the case. (3 Witkin, Cal. Proc. 5th (2008) Actions, § 950.)

Here, there is no admissible evidence that any proposed witness with material, important, not cumulative testimony would be inconvenienced by trial in Fresno.

Victoria Chakmak: There is no evidence that Mrs. Chakmak's testimony is material, important or not cumulative with plaintiffs' testimony. Plaintiff's declaration merely establishes that Mrs. Chakmak was in the car when it first experienced mechanical trouble. There is no testimony that she witnesses any statement by defendant, or could testify knowledgeably about the condition of the car at any point in time.

Ryan Chakmak: Ryan Chakmak's proposed testimony is not material or relevant. Where plaintiff was traveling when the axel broke is not particularly probative and plaintiff himself can provide this information. Ryan Chakmak is not needed to testify that his uncle never arrived for his graduation.

Dennis Codd: Plaintiff can testify that Mr. Codd is the Service Manager at Porsche of Newport Beach, and is employed in Newport Beach. Plaintiff's declaration establishes that he bought his car at Porsche of Newport Beach and regularly takes the car for service there. He would have reason to know Mr. Codd, his job title and place of employment. However, there are no foundational facts in plaintiff's declaration to establish how plaintiff knows that Mr. Codd ever viewed the after defendants worked on the car. Accordingly, there is no admissible evidence supporting the nature and relevance of Mr. Codd's proposed testimony.

Justin Desinmone: Plaintiff's declaration states that Desinmone is a mechanic at Porsche of Newport Beach who worked on the car prior to defendants doing so. Plaintiff's declaration establishes that he bought his car at Porsche of Newport Beach and regularly takes the car for service there. However, there are no facts in plaintiff's declaration that establish how plaintiff knows that Desinmone saw the car after defendants worked on the car. Accordingly, there is no admissible evidence supporting the nature and relevance of Mr. Desinmone's proposed testimony.

Chris Schultz: Plaintiff's declaration states that Shultz is a mechanic at Porsche of Newport Beach who worked on the car prior to defendants doing so. Plaintiff's declaration establishes that he bought his car at Porsche of Newport Beach and regularly takes the car for service there. However, there are no facts in plaintiff's declaration that establish how plaintiff knows that Shultz saw the car after defendants worked on the car. Accordingly, there is no admissible evidence supporting the nature and relevance of Mr. Shultz's proposed testimony.

Evidentiary objections:

Nos. 1, 2, 4, and 6 are sustained in full.

No. 3 is sustained as to "because Defendants had failed to bolt it on after removing it when they repaired the Car." The objections to the remainder are overruled.

Nos. 5 and 11 are overruled.

No. 7 is overruled as to "plaintiff's wife" and sustained as to the remainder.

No. 8 is sustained as to "who inspected Defendants' faulty repairs to the Car," "and after Defendants' faulty repairs described in this declaration and Plaintiff's Complaint" and "lives," and overruled as to the remainder.

No. 9 is sustained as to "who inspected Defendants' faulty repairs to the Car and made repairs to the Car after Defendants' faulty repairs described in this declaration and Plaintiff's Complaint" and "lives," and overruled as to the remainder.

No. 10. Is sustained as to "who inspected Defendants' faulty repairs to the Car," "and afire Defendants' faulty repairs described in this declaration and Plaintiff's Complaint," and "lives," and overruled as to the remainder.

The Reply Declaration of John Chakmak is disregarded. All evidence is to be filed and served with the notice of motion. (Code Civ. Proc., § 1005, subd. (b).) The court has discretion to disregard evidence filed in reply because of the prejudice it presents to the opposing party and in this case exercises that discretion. (*San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 316.)

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 10/18/16
(Judge's initials) (Date)